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No. 84-1022

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN W. YOUNG,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Third District

RESPONDENT'S BRIEF IN OPPOSITION

NEIL F. HARTIGAN
Attorney General of Illinois

JILL WINE-BANKS
Solicitor General of Illinois

MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570

Attorneys for Respondent

ELLEN M. FLAUM
Assistant Attorney General
Of Counsel

* Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court is without jurisdiction as the federal question presented was not raised or decided in the state court below.

Whether the petitioner has presented a substantial federal question regarding the admission of business records.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Appellate Court of Illinois, Third District, affirmed the revocation of petitioner's probation in an unpublished order, No. 3-83-0311, dated February 10, 1984. The text of that order is set out in the petition for a writ of certiorari as Appendix A. A petition for rehearing was denied by the court on March 29, 1984, and a petition for leave to appeal to the Illinois Supreme Court was denied on October 2, 1984.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. §1257(3). As treated more fully below, however, the respondent submits that this jurisdiction is not properly invoked. Alternatively, respondent maintains the petitioner has not shown any good reason for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF THE CASE

Respondent adopts the statement of facts contained in the Illinois Appellate Court order (Appendix A of Petition) and incorporates those facts by reference.

REASONS FOR DENYING THE WRIT

I.

THIS COURT IS WITHOUT JURISDICTION AS THE FEDERAL QUESTION PRESENTED WAS NOT RAISED OR DECIDED IN THE STATE COURT BELOW.

Petitioner has claimed jurisdiction by this Court under 28 U.S.C. §1257(3) which provides in part that a decision by the highest court of a state may be reviewed "where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." However, this Court has firmly established that it will not decide federal constitutional issues raised for the first time on review of state court decisions under this jurisdictional statute. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Respondent submits, therefore, that this Court is without jurisdiction as petitioner did not specifically set up or claim the Sixth Amendment question now raised in the instant petition before any state court below.

Petitioner states the issue before this Court is "whether evidence admitted as a business record through the testimony of a non-supervising custodian of the business record who possesses no knowledge regarding the procedure used to make the record nor safeguards implemented to insure its accuracy constitutes a violation of an accused's constitutionally protected right to confront witnesses against him." (Petition at p. 1) The issue as presented to the state courts, however, was not framed in federal constitutional terms, but rather as a question of the admissibility of the evidence under the business record exception to the hearsay rule.

At his probation revocation hearing, petitioner objected to the testimony of a witness regarding the contents of a microfilmed record which she did not prepare, but only received for filing, storage and retrieval. The witness was an employee of the National Automobile Theft Bureau (N.A.T.B.). (C. 110, R. 23) That organization receives shipping information containing vehicle identification numbers and component part numbers from the manufacturers of Harley-Davidson motorcycles. (C. 110, R. 24-25) This information is received on microfilm from the manufacturers and the microfilm is filed and stored by the N.A.T.B. (C. 110, R. 29-30) The witness supervised the filing and keeping of these microfilms. (C. 110, R. 29) At the request of the prosecution, the witness had viewed the microfilm records to determine the vehicle identification number which corresponded to a component part number supplied by the prosecution and had prepared an affidavit containing the information she obtained from the microfilm record. (C. 110, R. 25-26)

The basis of petitioner's objections to the testimony of the witness was that she had no first hand knowledge as to the accuracy or preparation of data contained in the microfilm records. (C. 110, R. 26, 31-32, 33, 36) While admitting the witness' testimony over objection, the trial court excluded the affidavit. On his motion for a new trial, petitioner again argued that the witness had no personal knowledge as to the original entries on the microfilm records and that her testimony was therefore inadmissible hearsay. (C. 111, R. 3-5) In its unpublished order, the Illinois Appellate Court stated, "It is the defendant's principal assignment of error on this appeal that the trial court should not have admitted the testimony of [the witness] under the business record exception." (*See* Appendix A of Petition)

Petitioner had consistently argued, therefore, that the witness' lack of personal knowledge of the making of the records she stored precluded their qualification as business records and rendered her testimony as to their contents incompetent. There had been no express or direct contention that the admission of the records constituted a violation of petitioner's right to confrontation. This is made evident by the Illinois Appellate Court order which contains no reference to any such federal question, but rather cites to the Illinois statute governing the admission of business records in concluding that the records referred to in this case were properly considered as business records. This Court has held that "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). As no federal question was either raised or passed upon in the state court below, the instant petition for a writ of certiorari should be denied for want of jurisdiction.

II.

PETITIONER HAS NOT PRESENTED A SUBSTANTIAL FEDERAL QUESTION REGARDING THE ADMISSION OF BUSINESS RECORDS.

Petitioner asserts that this Court should exercise its discretion to review the judgment of the Illinois Appellate Court in order to determine whether the admission of business records based upon the testimony of a sponsoring witness who has no personal knowledge of the making of the entries in those records violates the Sixth Amendment right to confrontation. Petitioner acknowledges, however, that trial judges are afforded considerable discretion

in determining whether a document qualifies for admission as a business record and that the sponsoring witness need not have been the person who prepared or even supervised the preparation of the record where the circumstances indicate the trustworthiness of the offered record. (Petition at pp. 13, 15-16) Thus, the gravamen of the issue presented by the petitioner is, in his own words, the problem "of defining the appropriate degree of trustworthiness necessary in order to relieve the State of its responsibility to bring forth as a sponsoring witness either the person who made the entry or supervised and has knowledge regarding the procedure used to make the entries and insure reliability." (Petition at p. 16) Respondent submits that this does not constitute a substantial federal question, but is simply a matter of state evidentiary law.

In *California v. Green*, 399 U.S. 149, 155 (1970), this Court observed that:

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law.

Further, this Court has stated that it "has not sought to 'map out a theory of the Confrontation Clause that would determine the validity of all hearsay exceptions.' " *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980) (citing *California v. Green*, 399 U.S. at 162). The admission of business records as an exception to the hearsay rule without a showing of the unavailability of the maker is grounded on the theory that such records have a special indicia of reliability based in part on the regularity of their mak-

ing and the reliance placed on them by business. *See* Fed. R. Evid. 803, Notes of Advisory Committee on Proposed Rules.

In Illinois the statute governing the admission of business records in criminal trials provides that:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in regular course of any business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

Ill. Rev. Stat. 1981, ch. 38, par. 115-5. The custodian or other witness need not have personal knowledge of the matter recorded. *Nussbaum Trucking v. Illinois Commerce Comm.*, 99 Ill. App. 3d 741, 425 N.E.2d 1229 (1981). In the instant case, the testimony established that the manufacturer's shipping records, identifying the vehicle registration number and component part numbers of motorcycles were routinely supplied to N.A.T.B. on microfilm and that these microfilm records were not altered or modified in any manner, but were merely filed and stored for retrieval. (C. 110, R. 26, 30, 39-40) There is nothing to indicate that such records were lacking in trustworthiness.

Petitioner relies, however, on what he regards as a conflict between various Illinois appellate court decisions on

the question of establishing the trustworthiness of records through a custodian witness. An alleged conflict among the appellate courts of a state in determining the admissibility of business records under a state statute does not constitute a substantial federal question. The Illinois Appellate Court distinguished the case of *People v. Clark*, 108 Ill. App. 3d 1071, 440 N.E.2d 397 (1982) on the grounds that the record in that case was not kept in the regular course of business while the records in the instant case were kept by N.A.T.B. in the regular course of their business. (*See* Appendix A of Petition) *People v. Bovio*, 118 Ill. App. 3d 836, 455 N.E.2d 829 (1983), which petitioner now cites, involved banking records generated by a computer system which performed calculations on the data entered. The records were held inadmissible in the absence of testimony going to the accuracy of the system which performed the calculations. The records in the instant case, however, were microfilmed shipping records which presumably involved no calculation of data.

The testimony adduced at trial established that the records in the instant case, while originally prepared by the manufacturer, were kept in the regular course of business by N.A.T.B. and were routinely used to provide vehicle identification information to law enforcement agencies. (C. 110, R. 24) This constitutes sufficient indicia of trustworthiness to support their admission. *See United States v. Ullrich*, 580 F.2d 765 (5th Cir. 1978).

Petitioner has not presented a substantial federal question based on the particular facts and circumstances of the instant case and, accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General of Illinois
JILL WINE-BANKS
Solicitor General of Illinois
MARK L. ROTERT *
Assistant Attorney General
188 West Randolph Street, Suite 2200
Chicago, Illinois 60601
(312) 793-2570
Counsel for Respondent

ELLEN M. FLAUM
Assistant Attorney General
Of Counsel

* Counsel of Record